

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLAN K. MARSHALL : CIVIL ACTION  
 :  
v. :  
 :  
 :  
PARK PLAZA CONDOMINIUM ASS'N, :  
CYNTHIA MORRISEY, SCULLY CO., :  
JOSHUA BERNSTEIN, and :  
ABRAHAM, LOWENSTEIN, BUSHMAN :  
& KAUFFMAN, P.C. : NO. 98-2912

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

January 13, 1999

Plaintiff Allan K. Marshall ("Marshall"), alleging violation of the Fair Housing Act ("FHA"), .... U.S.C. § 3601, et seq., filed this action against defendants .... Defendants Park Plaza, Morrisey, and Scully Co. (collectively "defendants") have filed a motion to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(4) and 12(b)(6). Alternatively, they filed a motion for a more definite statement under Rule 12(e) or a motion to strike under Rule 12(f). For the reasons stated below, defendants' motion will be **granted in part and denied in part.**

BACKGROUND

P brings a claim against D's for violation of the Fair Housing Act. Park Plaza Condo Ass'n, Morrisey, and Scully Co. filed a motion to dismiss for failure to state a claim and for improper service. These D's also include a request for a more definite statement and to strike certain portions of the complaint. The remaining D's filed an answer.

1. Park Plaza, Morrisey, and Scully Co. assert that they did not receive a summons with copies of the original complaint.

2. Plaintiff cured the service defect by properly serving defendants with the amended complaint and summons.

3. Defendants received notice of the action when it received service of the original complaint.

### **DISCUSSION**

#### **I. Standard of Review**

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Random v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

When deciding a motion to dismiss, the court properly may consider "matters of public record, orders, exhibits attached to

the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see Williams v. Stone, 923 F. Supp. 689, 690 (E.D. Pa. 1996), aff'd, 109 F.3d 890 (3d Cir.), cert. denied, 118 S. Ct. 383 (1997). When the plaintiff attaches an exhibit to the Complaint and incorporates it therein, he is bound by the contents of the exhibit. See Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). The court need not convert the motion to dismiss into a motion for summary judgment in order to consider the contents of an attached exhibit. See id.; Kolimaga v. Bartle, 871 F.2d 331, 340 n.3 (3d Cir. 1989).

#### **I. Service of Process**

Federal Rule of Civil Procedure 4(m) states that

[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

In deciding whether to extend the time for service under Rule 4(m), the court must first determine whether plaintiff has shown "good cause" for failing to properly serve the defendants within the time limit. See Petrucelli v. Bohringer & Ratzinger, GMBH, 46 F.3d 1298, 1305 (3d Cir. 1995). If good cause exists, the court must grant an extension of time for proper service.

See id. Marshall has not adduced evidence to establish he had good cause for failing to properly serve defendants with the summons as well as a copy of the original complaint.

Absent good cause, the court has discretion in deciding whether to dismiss an action for improper service or extend the time for service. See id. One factor a court may consider in exercising its discretion is whether the statute of limitations has run in the interim. See id. at 1305-06(quoting Committee). This factor may be used to grant an extension, but is not alone sufficient to deny an extension. See Boley v. Kaymark, 123 F.3d 756, 759 (3d Cir. 1997). A court may only consider this factor after it has decided that the plaintiff has failed to prove good cause. See Petrucelli, 46 F.3d at 1306.

The statute of limitations on this action ran after the filing of the original complaint. Service was allegedly defective because plaintiff did not serve the summons with a copy of the complaint. Defendants were put on notice of the action when they received a copy of the complaint, despite the absence of the summons. This court has adequate grounds to exercise its discretion and extend the time for service.

## **II. The Fair Housing Act**

The Supreme Court takes a liberal view of the FHA. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972). In Trafficante, the Court sustained a claim for loss of benefits from "interracial associations." v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972).

The Fifth Circuit has recognized a cause of action for threats to evict for entertaining minority guests. Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982).

The complaint states a cause of action under the FHA. Marshall alleges that he was evicted because he invited minorities into his condominium. (Compl. ¶ .) Marshall need not allege that defendants discriminated against him based on his own race.

There is cause of action under the FHA for failure to make repairs or delay tactics causing financial harm. See 42 U.S.C. § 3604.

#### **Other Rule 12 Motions**

Rule 12(e) states that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. Pro. Rule 12(e). The complaint is sufficient to give defendants notice of the causes of action.

Rule 12(f) states that "the court may order stricken from any pleading ... any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Pro. Rule 12(f). The paragraphs defendants request be stricken are not sufficiently offensive to warrant Rule 12(f) relief.

**CONCLUSION**

The court will dismiss plaintiffs' claims for breach of warranty, negligent misrepresentation and fraud and deceit. The court will deny defendants' motion to dismiss plaintiffs' claim for violation of UTPCPL.

An appropriate Order follows.

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ORDER

AND NOW, this 7th day of January, 1999, upon consideration of the motion to dismiss of Park Plaza Condominium Ass'n ("Park Plaza"), Cynthia Morrisey ("Morrisey"), and Scully Co. and all responses thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The rule to show cause hearing scheduled for January 8, 1999, is **DISCHARGED**.
2. The motion to dismiss of Park Plaza, Morrisey, and Scully Co. is **GRANTED IN PART** and **DENIED IN PART**.
3. Counts 2(B) and 2(C) of the amended complaint are dismissed.
4. Defendants shall answer Counts 1 and 2(A) on or before **January 25, 1999**.
5. Hearing re: Scully service of amended complaint.
6. Oral arg. on Sm.. judg.
7. Five days to reply to P's response...
8. Extend time for service until Dec. 31, 1998.

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Shapiro, S.J.